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NO. 86-742

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES A. HARRELL, ET AL.,
PETITIONERS

VS.

JAMES REEVES, ET AL.,
RESPONDENTS

VS.

RAY WILKES, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JAMES REEVES, ET AL., Plaintiffs	)	
v.	)	
JAMES A. HARRELL, JAMES B. DEAN, JR., and others, Intervenors	)	CIVIL ACTION NO. 78-61-MAC
v.	)	
RAY WILKES, et al., Defendants	)	

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION TO SET AWARD OF ATTORNEY'S FEES AND COSTS

In the case above identified the Plaintiffs, a class of black Deputy Sheriffs employed by the Bibb County Sheriff's Department, have filed a "motion to set award of attorney's fees and costs" seeking an award of attorney's fees and costs against the Defendants and against a group of white Deputy Sheriffs who were permitted to intervene as parties Plaintiff in this employment discrimination action to assert claims concerning the continued operation of a racial quota governing promotions in the Sheriff's Department. Briefs have been

submitted by counsel for the Plaintiffs, counsel for the Defendants, and by counsel for the Intervenors, and upon consideration, the Court determines that the Plaintiffs have no basis for the recovery of attorney's fees in any amount from the Defendants or from the Intervenors, and have also waived any entitlement to recover any items of cost by failing to file a timely bill of costs.

In 1979 this Court entered a Consent Decree as part of a settlement of this case between Plaintiffs and the Defendants, Sheriff Ray Wilkes and the members of the Bibb County Civil Service Board, hereinafter referred to as Defendants. Among other things, the Consent Decree imposed mandatory racial quotas regarding hiring, job assignments and promotions within the Sheriff's Department. After entry of the Consent Decree the Plaintiffs sought and were awarded attorney's fees and costs from the Defendants.

White employees of the Sheriff's Department were neither named as parties to the

Plaintiffs' suit nor were they alleged to have engaged in any discriminatory conduct against the Plaintiffs. In February, 1982, James A. Harrell and James B. Dean, Jr., white Deputy Sheriffs employed by the Sheriff's Department, filed a motion to intervene as party Plaintiffs individually and as representatives of other white Deputy Sheriffs. Mr. Harrell and Mr. Dean and other white deputies subsequently joined as Plaintiffs by the Court are hereinafter referred to as the Intervenors. The Intervenors asserted that the Sheriff's Department was violating their rights under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §§ 1981 and 1983 by reason of the existence and continued implementation of the Consent Decree's racial quota governing promotions within the Sheriff's Department. They alleged that the promotions quota foreclosed their competing for available positions on an equl basis with other eligible deputies. The Intervenors neither sought retrospective relief in the form of preferential

treatment or the reversal of promotions awarded to minorities under the Consent Decree, nor did they collaterally attack the initial legality of the Consent Decree and its provisions. The Intervenors sought only prospective relief in the form of dissolution of the mandatory promotion quota.

In due course the Intervenors filed a motion for dissolution of the promotion quota provision of the Consent Decree. The grounds for the dissolution of the promotion quota were that the Consent Decree's criterion for termination of the promotion quota had been satisfied and that continuation of the promotion quota would have an unlawful impact on the Intervenors.

After an evidentiary hearing the Court entered an order dissolving the promotion quota provision, finding as a fact that the Defendants had demonstrated the requisite good faith compliance with the provisions of the Consent Decree and the mndates of federal law. Plaintiffs appealed to the Court of Appeals for the

Eleventh Circuit asserting that the motion to intervene should have been denied as untimely and attacking the merits of the Court's decision dissolving the promotion quota provision. The Court of Appeals held that the motion to intervene was untimely, but did not reach the merits of continued implementation of the promotion quota provisions. In fact, the Court of Appeals expressly stated in its opinion that the white deputies "could alternatively institute an independent lawsuit and assert the specific violations of their rights". Reeves v. Wilkes, 754 F2d 965, at 971 (11 Cir. 1985). The Court of Appeals did not award attorney's fees to the Plaintiffs and the Plaintiffs did not submit a bill of costs as required by Rule 39 of the Federal Rules of Appellate Procedure.

In their motion for an award of attorney's fees the Plaintiffs apparently rely on 42 U.S.C. § 1988, which provides in pertinent part that "In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 .

prevailing party . . . a reasonable attorney's fee as part of the cost." (Emphasis added.)

The Intervenors are fellow employees of the Plaintiffs and were never alleged by the Plaintiffs to have discriminated against the Plaintiffs or to have controlled employment decisions made with respect to the Plaintiffs. Further, the Intervenors proposed no action to obstruct or overturn past employment decisions under the Consent Decree. They only sought to invoke the termination provision that the original parties included in the Consent Decree itself. The Intervenors were aligned as Plaintiffs in the case because they asserted a constitutional claim in good faith and prevailed in this Court on the merits of that claim. Because they did not discriminate against the Plaintiffs and in fact did no more that assert their own claims, the Inervenors cannot be compelled to pay the Plaintiffs' attorney's fees. An award of attorney's fees against the Intervenors would undermine the policy of § 1988

of encouraging "private Attorneys General" by posing a risk that legitimate claimants in a case would be ordered to pay the attorney's fees incurred by others in the proceeding.

Even if the Intervenors should have been considered adverse to the Plaintiffs, a party may recover attorney's fees against a plaintiff pursuant to 42 U.S.C. § 1988 only where the claim brought is frivolous, unreasonable or groundless . . . , a requirement that cannot be met in this case because the merits of the Intervenors' claims are clearly not frivolous, unreasonable or groundless. The fact that this Court ruled in favor of the Intervenors on the merits of their claims precludes any characterization of such claims as frivolous, unreasonable or groundless, and it is noted that the Court of Appeals in its opinion expressly stated that the Intervenors could renew their claims in an independent action in this Court. See Kirkland v. New York State Department of Correctional Service, 524 F. Supp. 1214 (S.D.N.Y., 1981).

The Plaintiffs cannot claim status as a "prevailing party" in this case so as to make them eligible for an award of attorney's fees under 42 U.S.C. § 1988 because they have not prevailed on the merits. They have only prevailed on their contention that the intervention was not timely filed, which is a procedural point. Hanrahan v. Hampton, 446 U.S. 754 (1980).

With regard to the Plaintiffs' claim for an award of attorney's fees against the Defendants, there is even less basis for such an award. When the Intervenors filed their motion to intervene the Defendants Ray Wilkes and members of the Bibb County Civil Service Board neither opposed or supported the motion. They responded to the motion by replying that they had in good faith complied with the provisions of the Consent Decree ever since its entry. They also reported the progress made toward reaching certain of the goals set out in the Consent Decree nd they emphasized that they would make every effort "to fully comply with

all provisions of said decree unless directed otherwise by the District Court".

The District Court permitted the filing of the intervention and the Defendants then answered stating that they had not deprived the Intervenors of any rights guaranteed to them by the laws and Constitution of the United States. They again asserted that they had in good faith complied with the provisions of the Consent Decree and that they would continue in good faith to implement the Decree's provisions "unless restrained or enjoined by this Court".

When the Intervenors filed their motion to dissolve or modify the promotion provision of the Consent Decree the Defendants again reiterated that "unless otherwise ordered by this Court, [Defendants] will continue in good faith to implement the provisions of the Consent Decree". The Defendants further stated that if the Court granted the Intervenors' motion the Defendants would "continue to comply in good faith with the requirements of the United States Constitution and federal law". Thereaf-

ter when this Court later granted the Intervenors' motion and dissolved the promotion provision of the Consent Decree the Court noted that the Defendants had adopted essentially a neutral position with respect to the relief sought by the Intervenors, and further, that the Defendants had demonstrated good faith compliance with the law and with the terms of the Consent Decree and the Court went further and recited the factual basis for the Court's determination.

The Defendants played at most a neutral role in the intervention proceedings and in the subsequent motion of the Intervenors to dissolve or modify the Consent Decree. They neither contested nor supported the intervention and throughout the proceedings on the intervention question and on the subsequent motion to dissolve and modify the Defendants steadfastly abided by the Consent Decree and repeatedly announced their intention to continue to do so unless enjoined. Thus, if anything, they supported the Consent Decree despite the efforts

of the Intervenors to modify or dissolve it.

The Court notes that the Plaintiffs in their motion assert that "Defendant Sheriff encouraged the Intervenors and refused to contest their intervention". There is nothing in the record in this case to support this assertion. As has been above noted, the Defendants consistently maintained the policy of neutrality with regard to the intervention motion and in the meantime have complied in all respects with the Consent Decree. The Defendants were simply not a party to the intervention dispute and the dispute about modification of the Consent Decree. Certainly the Plaintiffs cannot be regarded as a "prevailing party" as regards the Defendants. After the Plaintiffs and the Defendants entered into the Consent Decree in 1979 the Plaintiffs sought and obtained an award of attorney's fees against the Defendants, however, in that situation the Plaitiffs were the prevailing party and the award of attorney's fees was proper. In this case it is not.

The Court also notes that the Plaintiffs assert that the Defendants have acted in bad faith and for this reason should be subject to an attorney's fee award. There is no basis in the record for this contention. As has already been noted, the Defendants have conscientiously complied with the Consent Decree and they have consistently announced their intention to continue to do so until ordered to do otherwise by the Court, and the District Court specifically found that the Defendants had complied with the Consent Decree in good faith.

In summary, the Court concludes that the motion of the Plaintiffs to set an award of attorney's fees and costs against the Intervenors and the Defendants would not be justified in this case and should be and is hereby denied for the reasons above set out.

ENTERED this 13th day of August, 1985.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Manley F. Brown, a member of the Bar of the Supreme Court of the United States and counsel of record for Petitioners herein, hereby certify that on the 14th day of November, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari on each of the parties herein, as follows:

On James Reeves, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. Robert E. Steele, Jr.
Ms. M. Linda Mabry
614 Fulton Federal Building
Macon, Georgia 31201

This being the above-named Respondents' counsel of record.

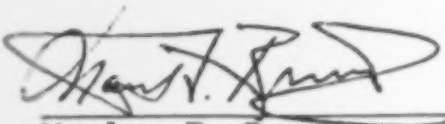
On Ray Wilkes, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. O. Hale Almand, Jr.
Sell & Melton
Post Office Box 229
Macon, Georgia 31297

This being the above-named Respondents' counsel of record.

All parties required to be served have been served.

This 14th day of November, 1986.



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